IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

INCOME TAX APPL. No. 37 of 2003

M/S. PASCHIMI RAJASTHAN DUDGH UTPADAK SAHAKARI SANGH LTD., JODHPUR.

V/S

DEPUTY COMMISSIONER OF INCOME TAX (ASSESSMENT) SPECIAL RANGE, JODHPUR.

Mr. B.C. MEHTA, for the appellant / petitioner

Mr. K.K. BISSA, for the respondents.

Date of Order : 4.12.2007

HON'BLE SHRI N P GUPTA,J.
HON'BLE SHRI MUNISHWAR NATH BHANDARI,J.

ORDER

This appeal has been filed by the assessee, seeking to challenge the order of the learned tribunal dated 13.03.2002, so far it relates to Income Tax Appeal No. 1762/JP/1994, for the Assessment Year 1992-93.

The facts of the case are, that vide Annexure 1, dated 11.11.1992, the Deputy Commissioner of Income Tax (Assessment), Special Range, Jodhpur, sent intimation to the appellant, whereby he intimated amount, determined by him, to be payable by the assessee. This was done in

exercise of powers under Section 143(1)(a) of the Income Tax Act, 1961. Thereafter, the appellant was sent notice dated 09.12.1992, for the regular assessment, fixing the hearing on 08.01.1993. However, during the course of assessment proceedings, the notice was served on the appellant under Section 154 of the Act on 21.01.1993, proposing to make the prima facie adjustment on account of provisions of gratuity under Section 40A(7), and it is alleged, that the appellant filed Revised Return, declaring the loss of Rs.55,04,885/- for the Assessment Year 1992-93, on 25.01.1993, instead of the declared loss of Rs.56,57,685/-. Then intimation under Section 143(1)(a) was sent to the assessee vide order dated 28.01.1993, and provisionally assessed/determined the loss at Rs. 53,76,603/-, and accordingly, the demand was created. Thereafter, the regular assessment, for the Assessment Year 1992-93 was made vide Assessment Order dated 25.02.1993, computing and assessing the loss of Rs.16,73,887/-, and observing rather finding, that the addition of Rs.2,81,082/- made through prima facie adjustment, do not require any modification or amendment, and the observations made in the order dated 28.01.1993, apply here also, and were treated as integral part of the Assessment Order. This assessment order has been produced as Annexure 5. Against this, an appeal was filed by the assessee, under Section 246 of the Income Tax Act, 1961, and the learned Commissioner of Income Tax (Appeals) accepted the same

partly, and remanded back to the Assessing Officer, with the direction to re-examine, and to pass fresh order, after affording the assessee opportunity to lead evidence, in support of the claims, while observing, that regular assessment proceedings under Section 143(3) are different from the proceedings under Section 143(1)(a).

Aggrieved of this, the Revenue filed an appeal before Tribunal, and Tribunal accepted the appeal vide order dated 13.03.2002. The assessee seeks to challenge the order of the learned Tribunal allowing the appeal of the Revenue, being appeal No. 1762/1994.

The tribunal has found, that Section 246 of the Act provides for a separate appeal against the order under Section 143(1)(a), and therefore, the Commissioner had no jurisdiction to decide the issue. It was found, that the Assessing Officer has passed the order under Section 154(1)(b), and therefore, the findings recorded by the Commissioner, were reversed on the ground of his having no jurisdiction to decide the issue, in appeal against the order made under Section 143(3) of the Act.

This appeal was admitted vide order dated 08.09.2003, by formulating the following three substantial questions of law:-

"(A) Whether the Income-Tax Appellate Tribunal, Jodhpur Bench, Jodhpur was illegally justified in accepting the appeal, filed by the Assessing Officer, relating to the Asst. Year 1992-93 vide Appellate order dated 13.02.2002, in view of the instant facts and circumstances of the Case, hereinbefore duly mentioned in the paras No.1 to 14 of this Appeal.

(B) Whether the Income Tax Appellate Tribunal, Jodhpur Bench, Jodhpur was illegally justified in accepting the appeal, filed by the Assessing Officer, relating to the Asst. Year 1992-93 inter-alia holding that section 246 of the Act, provides for Separate Appeal, against the order u/S 143(1)(a) of the Income Tax Act, 1961 and the Commissioner of Tax (Appeals) Jodhpur, has & had no jurisdiction to decide the issue, in the Appeal, which has been filed against the Assessment passed u/S 143(3) of the Income Tax Ac,t 1961,in view of the settled proposition of law that the intimation, which is being sent to the Assessee, as per the provisions laid down u/S 143(1)(a) of the Act, after making the prima facie Adjustment or subsequently Modified or Amended, vide Rectified intimation, u/S 143(1)(a) read with section 154(1)(b) of the Act, is nothing, but the Provisional Assessment of Prima Facie Adjustment or Adjustments for levying Additional Tax Payable u/S 143(1A) of the Income Tax Act, 1961, and the same is merged with the final Assessment, made u/S 143(3) of the Act.

(C) Whether the provisions laid down in u/S 246 of the Act, for filing separate appeal against the order u/S 143(1)(a) of the Act, and for non-filing of Appeal by the Assessee, debars the right of the Assessee, for challenging the issue in this respect during the Asst Proceedings u/S 143(3) of the Act, & for filing the appeal u/S 246 of the Act and equally the Appellate Authority has & had no jurisdiction to decide the issue in the appeal against the Asst.

order u/S 143(3) of Income Tax Act, 1961.

A bare reading of the questions would show, that the basic controversy is, as to whether the order under Section 143(1)(a), was, or being appelable, and no appeal having been filed, and order having been modified under Section 154(1)(b), whether it is open to the assessee, to assail the conclusions recorded in the order under section 143(1)(a) read with section 154(1)(b), in a appeal against the regular assessment order, made under section 143(3) of the Act.

A look at the provisions of section 246 of the Income Tax Act, which provides for appeal, and which has been taken into consideration by the learned Tribunal, shows, that as it existed at the relevant time, it did not permit filing of any appeal, against any order made under section 143(1)(a). This section 246 has undergone amendments from time to time, and the relevant amendment was made w.e.f. 01.06.1994, whereby the provision for appeal, against an intimation under section 143(1) or 143 (1B) was provided to lay. There is nothing to show, that this amendment was made to apply to the orders passed till then. At the cost of repetition, it may be noticed, that the intimation under section 143(1)(a) is, as old as 11.11.1992, while as noticed above, relevant amendment in

section 246 of the Act has been made only w.e.f. 01.06.1994, obviously, meaning thereby, that at the time, when the determination was made under section 143(1)(a), and/or intimation was sent to the assessee, he had no remedy of any appeal. That being the position, obviously, the assessee could very well assail the correctness of the determination made or findings recorded in that order under section 143(1)(a), in the appeal to be filed against the regular assessment made under section 143(3).

Thus, it is also clear, that the learned Tribunal has proceeded on basic misconception of law, about the availability of right of appeal to the assessee, against determination, or intimation, under section 143 (1)(a).

In view of the above conclusions, all the questions, as formulated, are required to be answered in favour of the assessee, and against the Revenue, and are accordingly, answered.

The net result is, that the appeal is allowed. The impugned order of the tribunal is set aside.

Since the Tribunal has not gone into the merits of the determination, and has set aside the order of the Commissioner, simply on the ground of his having no jurisdiction to decide the issue, in the appeals, we think

it appropriate to remand the matter back to the learned Tribunal, to decide the correctness of the findings of the Commissioner, on its own merits, and in accordance with law.

(MUNISHWAR NATH BHANDARI),J. (N P GUPTA),J.

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